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No. 95-448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

INTERSTATE BRANDS CORPORATION,

Petitioner,

—v.—

ROBERT B. REICH, Secretary of Labor,
United States Department of Labor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: September 13, 1995

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QUESTIONS PRESENTED

1. Whether the intent of Congress as expressed in the purposes clause and language of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*) ("FLSA") was to exclude from the computation of the "regular rate" miscellaneous penalties upon employers like the earned work credit system—which was negotiated between labor and management in the national baking industry as an inducement to settle a nationwide strike and which incidentally results in modest, deferred payments to employees which are not related to hours worked—such that the decision of the Court of Appeals for the Seventh Circuit is contrary to Congressional intent?

2. Whether the Court of Appeals for the Seventh Circuit, in construing the FLSA § 7(e)(2) exemption from the "regular rate," has, without warrant or justification, interpolated an additional requirement into that statutory exemption as set forth by Congress, by construing the language "other similar payments" of the provision to apply only to "payments that do not depend at all on when or how much work is performed"?

3. Whether the Third Circuit decision in *Minizza v. Stone Container Corp.*, 842 F.2d 1456 (3d Cir.), *cert. denied*, 488 U.S. 929, 109 S. Ct. 261 (1988), with which the Seventh Circuit decision here directly conflicts, more correctly construes the "other similar payments" language of FLSA § 7(e)(2) to exempt from the regular rate payments not "conditioned on a certain number of hours worked or on an amount of services provided," which would exempt from the regular rate computation miscellaneous inducements to settle strikes such as the earned work credit penalty in issue here?

4. Whether the Court of Appeals for the Seventh Circuit, by ignoring the plain and undisputed facts of the case, mischaracterized the earned work credit system so as to exclude it from § 7(e)(2) of the Fair Labor Standards Act?

PARTIES TO THE PROCEEDING BELOW AND RULE 29 DISCLOSURE

All parties to the proceedings below appear in the caption of this case and, pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, need not be separately listed.

Pursuant to Rule 29.1, the parent company of petitioner Interstate Brands Corporation is Interstate Bakeries Corporation, a Delaware corporation. Petitioner has one non-wholly owned subsidiary: Mrs. Cubbison's Foods, Inc., a California corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in this case entered on June 15, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, dated June 15, 1995 (App. A, 1a-10a) is reported at 57 F.3d 574 (7th Cir. 1995). The Judgment and Order of the District Court, dated March 21, 1994 (App. D, 15a-19a) is reported at 849 F. Supp. 1261 (C.D. Ill. 1994). The remaining orders of the district court and Seventh Circuit, attached in the Appendices hereto, were unreported.

JURISDICTION OF THIS COURT

The final judgment of the Court of Appeals (App. A, 1a) was entered on June 15, 1995. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review that judgment on petition for certiorari is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the Fair Labor Standards Act ("FLSA" or the "Act"), as amended, 29 U.S.C. §§ 201 *et. seq.*, are set forth in Appendix F (27a-29a). In particular, the focus of this case is Section 7(e)(2) of the FLSA, which states:

> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include . . .
>
> (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment* . . . [emphasis added].

STATEMENT OF THE CASE

This litigation was originally commenced in 1991 against Petitioner, a wholesale baker, by Respondent Department of Labor ("Respondent" or "DOL"). In so doing, the DOL suddenly departed from its position of 20 years' standing to claim that a collectively-bargained penalty system (the

"earned work credit system"), adopted nationwide in the baking industry in order to deter the assignment of bakery workers to non-consecutive days off, should no longer be eligible for exemption from computation of the "regular rate" under the FLSA.

Petitioner here, Interstate Brands Corporation ("Interstate" or "Petitioner"), is one of the baker-participants in the collectively-bargained earned work credit system. Interstate is a Delaware Corporation having its principal place of business in Missouri. Interstate is engaged in producing and selling bakery products throughout the United States, in which capacity it operates three bakery plants in the Central District of Illinois. Interstate is a member of the American Bakers Association and is one of the three major wholesale bakers in the Association that operate plants throughout the nation. (App. G at 30a). The American Bakers Association includes in its membership approximately 250 wholesale bakers nationwide (*id.*). These companies produce eighty percent (80%) of the bread products sold in the United States (*id.*). Interstate's employees relevant to this action are and have been represented by Local Union Numbers 316 and 319 of the Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO ("BCT"), and their terms and conditions of employment have at all times relevant been governed by successive collective bargaining agreements with the BCT. The vast majority of all production employees in the wholesale baking industry, and of the members of the Association, are represented by various locals of the BCT (*id.*).

Respondent, the DOL, brought this suit to overturn the collectively-bargained-for penalty provision that has become a standard in baking industry contracts and that, over two decades ago, induced baking industry employees to ratify a contract and call off a crippling strike. Respondent did this in spite of the implicit and explicit approval by the government of the earned work credit system since its inception, and in spite of the fact that all parties involved in the creation and promulgation of the system—employees, employers and

Union—found it to be an acceptable and equitable resolution to the labor strife that plagued the industry and prompted its creation. In fact, since 1972, over 220 wholesale bakeries throughout the United States, operated by local and national companies, and employing approximately 30,000 participating employees, have entered into collective bargaining agreements containing earned work credit provisions patterned after the original strike settlement (*id.* at 32a). The system has now been in existence in the baking industry for some twenty years, and it has operated to the satisfaction of the industry, the Union, and the employees (*id.* at 33a).

Origins and Operation of the Earned Work Credit System

The circumstances which produced the need for the earned work credit system are undisputed. Historically, members of the BCT in the baking industry worked on Sunday, Monday, Wednesday, Thursday and Friday, and had Tuesday and Saturday off (*id.* at 31a). This work schedule was necessitated by consumer demand; since the two biggest food shopping days have been, and still are, Saturday and Monday, it has always been necessary for the baking industry to produce on Friday and Sunday to ensure freshness of product for consumers (*id.*). However, beginning in the early 1960's, the BCT began demanding a consecutive Monday through Friday work schedule (*id.*). These demands caused significant labor unrest within the industry (*id.*). In major contract negotiations in 1972 involving California bakers, the BCT demanded that employees be given a Monday through Friday work week, that any work performed on Saturdays be paid at the rate of time and one half, and that any work performed on Sundays be paid at the rate of double time (*id.*). The industry employers resisted the BCT's demands on the grounds that market conditions required fresh products to be available in stores at all times including Mondays (*id.*).

In an attempt to force the industry to agree to the Monday through Friday work schedule, the BCT effected a massive work stoppage that involved approximately 12,000 workers and affected about 50% of the bread produced in the Western United States (*id.* at 32a). Schools, hospitals and small businesses were seriously affected (*id.*). After two weeks, the strike moved east, closing plants in New York and Massachusetts, affecting thousands of workers and causing bread shortages (*id.*).

Finally, after thirty days of arduous negotiations, the parties devised the earned work credit system to meet employee demands while not disturbing the production needs of the industry (*id.*). The earned work credit system was thus intended to provide "a deferred payment evolving from the Company's right to schedule work days and work weeks" and thereby to induce the employees to sign the contract, call off the strike, and return to work (*id.*).

The earned work credit system works as follows: Each time an employee is scheduled to work a week without two consecutive days off, a work credit, currently $12,[1] is assessed against the employer. Its value is not paid to the employee; rather, it goes into a general "pool" of accumulated credits. That pool is distributed to "eligible participants" in lump-sum payments once a year at the close of a calendar year period, ending in November. An employee is not automatically entitled to receive a portion of the accumulated work credits; rather, he must, with limited exceptions, be on the payroll at the time of distribution or have completed at least one year of service prior to any termination during the accrual year. Amounts in the pool of earned work credits accrued because of assignments of employees who have terminated their employment for any reason with less than one year of service are, according to the collective bargaining agreement, forfeited and reallocated at the time of the end-of-year distribution to eligible employees based on the number of shares

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[1] When originally promulgated, each credit was $10.

earned during the year. Therefore, an earned work credit share may turn out at the end of the accrual year to be worth more than the weekly accrual value by contract, and no employee can know how much he will actually receive until the time of distribution at the end of the year.

From the beginning in 1972, the Union and the industry have never considered the earned work credit system as part of hourly pay, or as affecting the "regular rate" of pay for overtime computation purposes (*id.* at 32a, 39a). Rather, this arrangement was early described, during 1973 in a letter from the Union and the industry to the then Cost of Living Council (the "Pay Board") under the Economic Stabilization Act of 1970, as "an incentive for employers to schedule, to the extent possible, employees on a consecutive day workweek" (App. H at 43a). In fact, the agreement initiating the earned work credit system specifically directs employers to "take such steps as are practical" to meet the objective of two consecutive days off for employees.

The Pay Board concurred with the industry-Union view that the earned work credits are not wages or wage substitutes. Pursuant to the wage and price controls instituted in the early 1970's, the baking industry and the BCT were required to submit the earned work credit strike settlement to the Pay Board for approval (App. G at 33a). After analyzing the earned work credit proposal, the Pay Board stated that it would not challenge any agreement containing the earned work credit provision (App. I at 46a). The Pay Board's decision was based on the fact that it did not find the earned work credits to constitute "wages" or "salaries" for purposes of the federal wage stabilization regulations (*id.* at 47a). According to the Office of Wage Stabilization:

> Much of the reasoning behind the decision stemmed from the fact that implementation of the consecutive workweek, by itself, does not constitute a chargeable adjustment according to the Pay Board Regulations since, *by itself, it does not result in more pay for the same hours worked or the same pay for fewer hours*

> *worked. Hence, the ten dollars represented a trade off arrived at through the collective bargaining process* for a nonchargeable contract provision [*id.*] [emphasis added].

Thus, the Pay Board determined that earned work credits are not wages or salaries, or in lieu of wages or salaries, as those terms traditionally are defined.

In addition, the DOL has reviewed the operation of the earned work credit system in numerous payroll audits of bakery facilities since 1972 and has never pursued any objection to the program prior to this litigation. Moreover, other Interstate operations which are parties to collective bargaining agreements, containing identical language to the earned work credit system being challenged here, have been audited by the DOL in the past, and, until the instant litigation, the DOL has *not* taken the position that this practice violates the FLSA.[2]

Thus, the instant litigation came as a complete surprise. It stems from a routine 1988 DOL payroll audit of the Bloomington, Illinois facility of the Purity Baking Company, a subsidiary of Interstate and a party to a collective bargaining agreement containing an earned work credit provision. The resulting investigation concluded in the spring of 1989. Interstate, however, received no notice that the earned work credit system was being challenged until on or about March 20, 1991 (*three* years later). At that time, the District Director wrote to inform Interstate that the Solicitor of Labor had then "opined that the cash value of the earned work credits is not excludable from the employees' regular rate under any of the provisions of section 7(e) of the FLSA." Several months thereafter, the DOL filed this suit, seeking an injunction

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[2] The only evidence that the DOL ever questioned the earned work credit system was over 15 years ago: in or about 1978, the DOL instituted a lawsuit in federal court against ITT Continental Baking on the grounds that the value of the earned work credit should be included in the employees' "regular rate" of pay for purposes of computing overtime. However, the matter was neither settled nor prosecuted to conclusion and was apparently abandoned by the DOL (*see* App. G at 34a).

requiring future payments under the earned work credit system to be included in computations of the regular rate.

Proceedings Below

The parties filed cross-motions for summary judgment.

In essence, Respondent contended that the earned work credits were "regular and recurring" payments to employees and that only "infrequent and sporadic" payments could qualify as "other similar payments to an employee which are not made as compensation for his hours of employment," the wording of the statutory exclusion set forth in 29 U.S.C. § 207(e)(2).

Interstate, on the other hand, contended that the earned work credits were essentially a penalty against the employer, instituted as an inducement to settle a nationwide strike, and that the resulting, deferred and modest,[3] payments to employees required to foreshorten their weekly time-off periods were miscellaneous payments, not related to the number of hours worked or the time of day or the day of the week the work was performed; as such, earned work credits were "not made as compensation for [ ] hours of employment," so that the statutory exemption found in § 7(e)(2) applied.

The district court granted summary judgment in favor of Respondent. After holding that both Petitioner's and Respondent's interpretations of the statute were plausible, the court gave some deference to Respondent. However, it required Respondent to set forth a "reasoned analysis" for its position, finding that Respondent's position constituted a change in interpretation, since Respondent had overtly acquiesced to the operation of the earned work credit system for over twenty years. (App. E at 25a).

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[3] As the Stipulated Facts in this case indicate, the earned work credit has amounted to, at most, an additional $576 per year for eligible participants, and in many cases the participants receive much less than that.

In response, Respondent filed a Declaration by the Wage and Hour Administrator, Maria Echaveste, in which the latter averred that the DOL had not changed its position concerning the earned work credit system.[4] As its "reasoned analysis," the DOL stated that its position that earned work credits were too regular and recurring to qualify for the statutory exclusion was consistent with the statute, and that, as the Administrator of the FLSA, it had authority to make such determinations.

With this additional submission, the district court then held that Respondent had finally articulated a reasoned analysis which was able, barely, to "cross the threshold of providing a justification for its change in policy and procedure." App. D at 18a.

The Seventh Circuit affirmed the district court's holding; however, it did so for entirely different reasons. First, it found no deferral obligation to Respondent, because Congress has not delegated to Respondent the power to interpret § 7 of the FLSA. Therefore, it went directly to the issue of interpretation of the statute.

The Seventh Circuit rejected both Respondent's and Petitioner's proffered interpretations. First, it rejected Respondent's definition of the word "similar" as requiring payments to be "infrequent or sporadic." The court explained that the other exemptions in § 7(e)(2) "are not infrequent by any understanding." App. A at 5a. As a result, the DOL's contention that regular and recurring payments are ineligible for the statutory exclusion became completely irrelevant to the Seventh Circuit's reasoning and analysis.

Concerning Petitioner's position, the Seventh Circuit believed that Petitioner was asking the court to disregard the word "similar" from § 7(e)(2) entirely. It refused to accept Petitioner's explanation that "similar" meant other miscellaneous payments "not made as compensation for [ ] hours of employment." The court seemed to believe that doing so

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[4] The district court expressly found this claim to be "incredible." App. D at 17a.

would make it impossible to refuse the benefit of the exemption to schemes of obvious subterfuge, and that such a definition would render § 7(e)(2) a "catch-all."

The court also attempted to distinguish *Minizza v. Stone Container Corp.*, 842 F.2d 1456 (3d Cir.), *cert. denied*, 488 U.S. 929, 109 S. Ct. 261 (1988), on two grounds: (1) *Minizza* involved only two annual payments; and (2) *Minizza* treated those payments as equivalent to a litigation settlement.

The Seventh Circuit summarily rejected giving consideration to the Congressional policy objectives behind the FLSA, as well as the importance of the substantive characterization given to the payment. Instead, it analogized the earned work credit system to a premium for night shift or Sunday wages, and decided that it should be dealt with, if at all, under §§ 7(e)(6) or (7). It then proposed its own definition of the word "similar": "payments that do not depend at all on when or how much work is performed." App. A at 9a. Based on that definition, it determined the earned work credit system to be outside the § 7(e)(2) exemption. The Seventh Circuit therefore affirmed the district court's decision enjoining Interstate from use of the § 7(e)(2) exemption to cover the earned work credit system, although it rejected much of the district court's reasoning, and it left open the question of whether the earned work credit system might qualify for exclusion from the regular rate on other grounds.[5]

REASONS FOR GRANTING THE WRIT

This Court has consistently required the FLSA—indeed, any federal statute—to be interpreted in light of its Congressional purpose. However, the Seventh Circuit's decision has ignored the manner in which Congress intended the FLSA to protect workers, and it has taken the Act beyond the scope of its original purpose. The result of the Seventh Circuit's

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[5] The court suggested §§ 7(e)(6) or (7), grounds not claimed by Petitioner, which, as discussed below (*see* Section IV, *infra*), are inapplicable to the penalty system at issue here.

unilateral action will be to exclude from § 7(e)(2) incentives to labor peace that were intended by Congress to be outside the "regular rate" for overtime purposes.

Moreover, the Seventh Circuit actually altered the statutory requirements of § 7(e)(2), thus infringing upon Congress' role in drafting and promulgating federal statutes. The court added a requirement that is not evident anywhere in the statute: "payments that do not depend at all on *when* or how much work is performed" (emphasis added). The ramifications of this decision thus extend beyond the immediate circumstances of this particular penalty scheme, which merely produces a modest payment to workers scheduled so as to lose their second consecutive day off. The decision, in fact, announces a broad principle with consequences beyond the idiosyncratic scheduling necessities of this industry and would, in manifold ways that cannot be entirely foreseen, deprive labor and management of flexibility in devising arrangements to resolve otherwise intractable disputes that Congress clearly intended them to have.

Moreover, the immediate circumstances are significant. The Seventh Circuit's decision threatens the stability of labor relations in the baking industry nationwide and would reopen a conflict settled to everyone's satisfaction more than two decades ago—a conflict which produced massive strikes and interruption of the stream of commerce for weeks. The importance of the questions here nationwide, to an entire industry, counsels that this Court should decide these issues.

In addition, the Seventh Circuit's decision has caused a sharp and significant split in the Circuits concerning the interpretation and scope of § 7(e)(2). The Third Circuit in *Minizza* explicitly held the word "similar" to refer to compensation not for hours worked—a reference dictated by the express language of that subsection. In addition, the *Minizza* court emphasized substantive characterization of the payment as the crucial element in determining whether or not a payment is covered by § 7(e)(2). Thus, the Seventh Circuit's unsupported addition to the statutory requirements, and its unwillingness

to consider the issue of characterization based upon the origins and purpose of a payment, are causing decisional law to be created in an inconsistent fashion.

Finally, the Seventh Circuit misconstrued the earned work credit system by focusing entirely on the eventual receipt of a modest payment by employees and by ignoring entirely the intended operation of the system as a penalty and disincentive to the employer for a very specific purpose in the collective bargaining relationship between labor and management. The indulgence by the court here in statutory interpretation unbridled by Congressionally-declared purposes, and the deleterious consequences of such judicial initiative for collective bargaining adjustments Congress clearly intended to be accorded deference, counsel reversal of the decision below.

I. THE CONSTRUCTION OF THE STATUTE BY THE COURT BELOW IS IMPROPER AND VIOLATES CONGRESSIONAL INTENT.

This Court has consistently reaffirmed the most basic principle of statutory interpretation: the courts "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781 (1984). However, in this case the Seventh Circuit has interpreted the FLSA in a manner clearly inconsistent with Congressional intent. Moreover, not only does the Seventh Circuit depart from Congressional intent, but it departs from the text of the statute, modifying and adding to statutory requirements —in effect, becoming Congress' 'editor.' Petitioner, on the other hand, proposed an interpretation wholly consistent with, and in fact effectuating, Congressional intent—which interpretation the Seventh Circuit erroneously rejected.

A. The Decision Of The Seventh Circuit Fails To Implement, And In Fact Overrules, The Policy Objectives Of The FLSA; Thus, That Decision Violates Congressional Intent, Whereas Petitioner's Approach Effectuates It.

Section 2 of the FLSA, the "Congressional Finding and Declaration of Policy," states:

> (a) The Congress finds that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . (2) *burdens* commerce and *the free flow of goods* in commerce; (3) constitutes an *unfair method of competition* in commerce; [and] (4) *leads to labor disputes burdening and obstructing commerce* and the free flow of goods in commerce . . .
>
> (b) It is declared to be the policy of this chapter . . . to correct and as rapidly as practicable *to eliminate the conditions above referred to* in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202 (emphasis added). (*See also* App. F at 27a).

This Court in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739, 101 S. Ct. 1437, 1444 (1981), declared that "[t]he principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours." This Court has also recognized that the FLSA "reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 36, 107 S. Ct. 2694, 2700 (1987).

Additionally, the legislative history indicates that the FLSA was intended to "aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for

themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945). It was enacted to "reinforce employee bargaining power concerning hourly wages . . . [and] hours of labor." *Murray v. Noblesville Milling Co.*, 131 F.2d 470, 473 (7th Cir. 1942).

Moreover, as to the overtime provisions of the FLSA, toward which this litigation is essentially directed, the Seventh Circuit itself has previously held that:

> The first purpose was to prevent workers willing (maybe out of desperation, though this is no longer very likely) to work abnormally long hours from taking jobs away from workers who prefer to work shorter hours. * * * The second purpose was to spread work and thereby reduce unemployment, by requiring an employer to pay a penalty for using fewer workers to do the same amount of work as would be necessary if each worker worked a shorter week. The third purpose was to protect the overtime workers from themselves: long hours of work might impair their health or lead to more accidents (which might endanger other workers as well).

Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1175-1176 (7th Cir. 1987).

However, "[i]t was *not* the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement." *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203-04 (1947), *mod. on other grounds*, 331 U.S. 795 (1947) (emphasis added). In fact, "Congress intended the courts to have some flexibility in determining whether wage payment plans were in substantial compliance with the Act." *Brennan v. Valley Towing Co.*, 515 F.2d 100, 110 (9th Cir. 1975). As the Third Circuit in *Minizza*, 842 F.2d at 1463, stated:

> The FLSA was not intended to emasculate the ability of labor and management to be creative in resolving labor disputes in a manner which is mutually beneficial from

> an economic standpoint to all parties involved in such negotiations. The FLSA should not be used [ ] as an impediment to creative and innovative collective bargaining which brings labor peace.

Clearly, *none* of the concerns toward which Congress directed the FLSA and its overtime provisions exist here. First, it is undisputed that these bakery workers enjoy compensation and benefits among the most highly paid in the country for similarly skilled work (App. G at 36a) and thus are not within the concern about substandard wages emphasized by Congress in the FLSA. Additionally, the earned work credit system is a collectively-bargained inducement to maintain labor peace between a large industry and a strong, national union capable of leading its members into major work stoppages that burden commerce; thus the FLSA purpose of strengthening employee bargaining power is not infringed, but is in fact abetted, by the earned work credit system.

Nor is the Congressional purpose of eliminating unfair competition served by the Seventh Circuit's decision. If anything, the existence of the work credit system has *helped to eliminate* unfair competition throughout the baking industry by standardizing contract terms and business practices. Moreover, the earned work credit system has no relationship whatsoever to hours worked by employees, to the incidence of overtime in this industry, to the length of the workweek, or to the number of hours in the work day—which are the phenomena the Seventh Circuit in *Mechmet* said are the means of exploiting workers which Congress adopted the FLSA to control. In addition, there is no reason to believe that the earned work credit system is a subterfuge to avoid the legitimate implications of the statute. Finally, the prospect of having to include the earned work credit system in the regular rate is already causing labor trouble in the baking industry, in *direct conflict* with the Congressionally-declared purpose of the FLSA. (See § III, *infra*.) As a result, while the earned work credit system raises no issue or cause for concern about the

exploitation of workers—which is the focus of the overtime provisions of the FLSA—its role as a collectively-bargained employer disincentive furthers the declared Congressional objective of reducing the threat of labor strife.

Therefore, it is apparent that no substantial purpose is furthered by inclusion of the earned work credit system in the regular rate. Nevertheless, the Seventh Circuit overlooked the body of Supreme Court decisions and the legislative history concerning the FLSA when handing down its decision and thus has taken the statute beyond the scope of its Congressionally-declared purposes. While the Seventh Circuit acknowledged the genesis of the FLSA, the existence of the policy objectives of the statute, and the lack of the need of FLSA protections against exploitation in the instant case, it allowed those three factors to have no further impact on its decision.[6] Thus, the Seventh Circuit in essence admitted that its decision is at odds with express policy objectives of the FLSA, and that it is irrelevant to the purposes of the overtime provisions that it itself had identified in *Mechmet*.

To justify its decision, the Seventh Circuit simply offered a rhetorical *tour de force*: "the scope of the FLSA far outruns its original justification. There is no collective-bargaining exemption from the FLSA." App. A at 8a. However, this attempt at justification fails. The lack of any "collective-bargaining exemption" is no impediment to a decision in favor of Petitioner. Petitioner neither was nor is asking for a blanket collective-bargaining exemption. Rather, Petitioner was pointing to the modest amount of the payment in relation to wages and the arms-length negotiations through which this

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[6] *See* App. A at 8a ("It may be, as Interstate Brands stresses, that modern bakers are not in need of the FLSA to protect them from intolerable hours of work and penurious wages, but the overtime provisions of the FLSA apply without regard to the level of the standard wage. The genesis of the FLSA lay in a desire to improve the welfare of unorganized, low-wage employees, see *Brooklyn Savings Bank*, 324 U.S. at 707, n.18, but as is true with so many statutes the scope of the FLSA far outruns its original justification. There is no collective-bargaining exemption from the FLSA").

compromise was achieved as clear evidence that the system is not an attempt to disguise or circumvent the regular rate. Since the exemptions from the regular rate are to be determined in light of the policies of the FLSA, which expressly recognize the importance of insuring labor peace through collective bargaining, and since the Seventh Circuit essentially conceded that those policies are not being fulfilled in the instant case, no blanket exemption would be necessary. Put simply, the Seventh Circuit should have factored the substantial public policy objectives of the Act into its decision.

The effect of allowing the decision below to stand would be to sanction judicial indifference to Congressionally-determined national labor policy where Congress clearly wanted such policies to have an impact, and to authorize judicial abrogation of the flexibility to devise creative solutions to industrial conflict Congress intended to preserve in the FLSA. Because the departure here from Congressionally-stated policy and canons of statutory construction has potentially broad consequences for the conduct of labor-management relations, this Court should firmly anchor administration of the FLSA to the purposes Congress intended to be honored.

B. The Seventh Circuit Misconstrued the Requirements of Section 7(e)(2) And Unilaterally Supplemented The Statute, Thus Usurping The Role Of Congress.

The Seventh Circuit determined that the phrase "other similar payments to an employee which are not made as compensation for his hours of employment" should be defined as payments which are not compensation for hours of employment, *and* "payments that do not depend at all on *when* or how much work is performed." App. A at 9a (emphasis added). In doing so, the Court added a requirement that is not apparent anywhere in § 7(e)(2). In other words, the Seventh Circuit, by judicial fiat, has made compliance with the FLSA more onerous than before, and has supplemented the statute

in a way Congress did not intend. Such judicial activism thus amends the very standard promulgated by Congress and operates to exclude from § 7(e)(2) non-wage payments intended by Congress to be covered—miscellaneous payments, such as those which result from the earned work credit penalties, which are not compensation for hours of employment.

The Seventh Circuit's construction of § 7(e)(2)—or, more specifically, its limitation of the word "similar" to refer only to "payments that do not depend at all on when or how much work is performed"—has no support in the statute and no roots in prior decisional law. The word "similar" can only refer to the two antecedents in § 7(e)(2), which are: payments for vacation, holiday and illness; and reimbursement for traveling and other job-related expenses. However, the Seventh Circuit does not explain how it determined that the link between those two antecedents, which spawns the definition of "similar," is that neither depends on "*when*" work is done. Nothing in § 7(e)(2) prompts that conclusion, any more than the subsection prompts the conclusion that they are similar because neither depends upon wearing a uniform, or achieving a certain rank in one's place of employment. Certainly, payment for vacation, holiday or illness has as much, or as little, to do with when work is performed as does a payment for foreshortening the normal two consecutive days off per week. In other words, the requirement interpolated by the Seventh Circuit was not taken from the subsection itself, but rather imposed unilaterally without basis in law, text, precedent or logic. Thus, the Seventh Circuit has gone beyond statutory interpretation and rewritten the FLSA, something only Congress can do.

The definition proposed by Petitioner, on the other hand, is wholly consistent both with the text of the statute and with Congressional intent, and derives its basis from the exact language of § 7(e)(2); the word "similar" simply means those payments "which are not made as compensation for [ ] hours of employment." Contrary to the Seventh Circuit's assessment, Petitioner did not "excise" the word "similar" from the

statute. Rather, Petitioner read the statute naturally, with the words following the term "similar" modifying and thus defining it.

The Seventh Circuit's new definition of "similar" creates a standard different from, and more onerous than, the one Congress intended, and thus it operates to exclude from § 7(e)(2) payments that meet Congressional policies, purposes, and requirements—i.e., payments, such as employer penalties like the earned work credit, whose primary purpose is not employee compensation at all but the deterrence of particular employer assignment practices.

II. THE SEVENTH CIRCUIT'S CONSTRUCTION CONFLICTS DIRECTLY WITH THE THIRD CIRCUIT'S CONSTRUCTION IN *MINIZZA*.

The definition proposed by Petitioner—that the word "similar" refers to those payments "which are not made as compensation for [ ] hours of employment"—is the exact approach taken by the Third Circuit in *Minizza v. Stone Container Corp.*, 842 F.2d 1456 (3d Cir.), *cert. denied*, 488 U.S. 929, 109 S. Ct. 261 (1988). By departing from the proper lead of the Third Circuit in defining the term "similar," the Seventh Circuit has created a direct conflict between it and the leading Circuit decision on point.

Minizza is a case almost on all-fours with this one. In *Minizza*, a new, collectively bargained-for contract provided that employees would receive a lump sum payment once during the year for the following two years. *Id.* at 1458. As in the present case, this clause "served as an inducement to the employees to ratify the agreement." *Id.* Also as in the present case, the parties in *Minizza* agreed that the inducement would not be used to calculate overtime. *Id.*

The Third Circuit first held that the "other similar payments" clause of Section 7(e)(2) "does not mean just other payment for idle hours or reimbursements, the two types of payments set forth in the two preceding clauses of the section,

but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two samples." *Id.*, p. 1461 (emphasis added). Thus, "the analysis [should be focused not] on the specific type of payment [but] whether the type of payment is compensation *for hours worked* or service rendered." *Id.* at 1461 (emphasis added). The Court then held that the lump sum payment was to be excluded from the regular rate under § 7(e)(2)

> because [it is] *similar in character* to other payments set forth in that section; *that is, [it is] not payment[ ] relating to hours of employment or service*. The facts show that these payments were nothing more or less than an inducement by the employers to the employees to ratify the agreement on the terms proposed by the employers. . . . *If the payments were made as compensation for hours worked or services provided, the payments would have been conditioned on a certain number of hours worked or on an amount of services provided.* However, no such requirement was agreed to by the parties.

Id. at 1462 (emphasis added).

As in *Minizza*, the resulting payments from the earned work credit system here are not in any way "conditioned on a certain number of hours worked or on an amount of services provided." Thus, as does Petitioner in the instant case, the Third Circuit defined "similar" as a payment "not [ ] relating to hours of employment or service." *Id.* Therefore, the Seventh Circuit's decision not only misconstrues the requirements of § 7(e)(2) and violates Congressional intent but is also in direct conflict with the Third Circuit's construction of the statute.

The Seventh Circuit's decision directly conflicts with that of the Third Circuit in another aspect as well. The Third Circuit in *Minizza* emphasized that *substantive characterization*, not terminology, is what determines eligibility of a payment for the § 7(e)(2) exclusion.

> [W]hat the payments are termed is not important. *What is important is the substantive characterization* of the

> payments, which is not compensation for hours worked but rather *as an inducement for ratification.*

Id. at 1462, n. 9 (emphasis added). However, the Seventh Circuit deemed characterization unimportant. *See, e.g.*, App. A at 4a (". . . *whether or not* designed as a 'penalty' . . .") (emphasis added). The Seventh Circuit overlooked the fact that the earned work credit system was, as in *Minizza* and in its origins and essence, an inducement to contract ratification.

In fact, it is the Seventh Circuit's diffidence to the important issue of characterization that leads it to propose its bizarre hypothetical. The court proposed the absurd situation where an employer would pay minimum wage, plus accrue $52 for every day on which work is scheduled, payable at year-end. This system, the court stated, would fit Petitioner's construction of the statute, but should not be exempted from the regular rate.

However, the Seventh Circuit could reach that conclusion only because it ignored the import of characterization. By looking to that factor, it is easy to distinguish the two situations. The $52 per day for every day's work in the court's hypothetical is clearly compensation for the work performed on the days for which it would accrue. That the compensation is attributed to days rather than hours is merely an alternative means of attributing pay to time worked. It has nothing to do with the quality of time off, which is the triggering circumstance for the earned work credit. For this reason, as well as because of the sheer size of the payment in relation to wages, the hypothetical arrangement is clearly a subterfuge to evade the law. An earned work credit payment, however, is an employer penalty, resulting in only modest eventual proceeds to the employees. In context, the earned work credit is dwarfed by the wages paid currently and is not related to time spent working at all.[7]

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[7] In addition, the hypothetical deferred payment is not a strike settlement, designed primarily to end labor strife, nor, given the realities of collective bargaining, would it likely ever be negotiated by anyone.

In an attempt to distinguish the holding in *Minizza*, the court mischaracterizes the Third Circuit's decision by stating that it "treated these payments as equivalent to sums received in litigation rather than as compensation for work." App. A at 8a. The Third Circuit *never* made such a statement; rather, as is apparent from the excerpts quoted above, it saw the payments as inducements to ratify a contract—exactly the same way all the involved parties here saw the earned work credit system when it was designed and have treated it since.

The Seventh Circuit also attempts to distinguish *Minizza* from the instant case by stating that the earned work credit system "involves long-term, planned distribution of a kind dissimilar to the one-time distribution in *Minizza*." *Id.* However, the Seventh Circuit's earlier exhortations directed at Respondent against making the definition of "similar" contingent upon a level of infrequency defeat its very argument at this point. In rejecting the DOL's construction of the FLSA, the Seventh Circuit correctly concluded that § 7(e)(2) payments are not required to be rare or infrequent to qualify for the exemption, noting that "the other principal subjects of § 7(e)(2) [recited in the statute itself] are not infrequent by any understanding." *Id.* at 5a. Thus, even assuming that the frequency of accrual or payments is a distinguishing factor between the two cases, it is an inconsequential and immaterial one by the Seventh Circuit's own reasoning. Further, the payments in *Minizza* were certainly regular for the life of the contract there, and there is no reason to believe, given the realities of collective bargaining, that they would not be a feature of future contracts.

Allowing the Seventh Circuit's decision here to stand would operate to deprive collective bargaining participants of the flexibility to devise creative inducements to end labor strife, even when such inducements do not materially affect the wages received by employees. It is, therefore, proper for this Court to end the dispute between the Circuits and explain that "similar" simply refers to those payments "which are not made as compensation for [ ] hours of employment," and that,

therefore, the earned work credit system comes within the § 7(e)(2) exception to the regular rate.

III. THE DECISION OF THE SEVENTH CIRCUIT IS DISRUPTIVE OF LABOR RELATIONS.

One of the policy objectives of Congress in enacting the FLSA, discussed *supra* in § I.A., was to eliminate "labor disputes burdening and obstructing commerce and the free flow of goods in commerce." 29 U.S.C. § 202(a)(4). However, the Seventh Circuit's decision here threatens to disrupt the stability in the baking industry restored by the negotiated earned work credit penalty.

The history of labor strife, strikes, and ultimate compromise by all of the parties involved in the baking industry is uncontested and undisputed in the record. In 1972, the BCT effected a massive work stoppage that affected tens of thousands of workers and caused major bread shortages. As a result of the institution of the earned work credit penalty, labor peace and the free flow of commerce in the baking industry were restored and have been maintained for over two decades. However, this achievement is now in jeopardy. Soon after the District Court's decision, the Union stated in a letter to Petitioner that "*the decision is beginning to cause confrontation at the bargaining table with other employers* as they attempt to address the potential future ramifications of this decision." App. J at 50a. That result is in direct conflict with the stated Congressional purpose and policy of the FLSA of fostering "the free flow of goods in commerce" and eliminating "labor disputes burdening and obstructing commerce and the free flow of goods in commerce." 29 U.S.C. § 202(a).

The Seventh Circuit's decision unsettles the stability of the baking industry by threatening to revive the state of two decades ago—massive strikes and interruption of the stream of commerce. The importance of these issues to an entire nationwide industry commends review by this Court.

IV. THE SEVENTH CIRCUIT MISCHARACTERIZED THE EARNED WORK CREDIT SYSTEM.

In the course of slighting the importance of substantive characterization of a payment, emphasized by the Third Circuit in *Minizza*, the Seventh Circuit here actually mischaracterized the earned work credit system. This mischaracterization then led it into confusing and erroneous observations about the potential relevance of Sections 7(e)(6) and 7(e)(7) of the FLSA, and distracted its attention from the significance and propriety of the § 7(e)(2) exemption for this penalty system.

The Seventh Circuit stated that earned work credits "are akin to premium wages for working weekends, or the night shift . . ." App. A at 8a. This view simply disregards the undisputed facts. Earned work credits are not the same as a "Sunday rate" or "nighttime rate" because the system is *indifferent* to what hours of the day or days of the week the work is done. It is irrelevant whether an employee works the day shift, evening shift, Sunday, Monday, Tuesday, Wednesday, Thursday, Friday, or Saturday. This is because the system was intended only to deter the employer from shortening an employees' opportunity for a normal two consecutive days off in the peculiar consumer market circumstances which dictate the production schedule of this industry. Therefore, the emphasis is properly on whether the employee has two consecutive days off, *whenever* they occur during the week.

Every fact in the record supports this conclusion. It is undisputed that the earned work credit system arose as an assurance to baking industry employees that, whenever feasible, employers would schedule weeks with two consecutive days off, and as an incentive to employers to schedule production so as to require as few employees as possible to give up two consecutive days off. Thus, the system was designed to penalize the employer for failing to provide its employees with the customary 'mini-vacation' that the majority of the country receives and looks forward to.[8]

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[8] In effect, the credit is a reimbursement for requiring the employee to plan on forgoing the additional rest and relaxation oppor-

Thus, the earned work credit is different from night-shift or Sunday wages. It is not a premium based upon the shifts or hours an employee works but rather a penalty on the employer for forcing the employee to give up a two-day weekend that most working people take for granted as a time to rest and rejuvenate. Employers are penalized for lowering the quality of their employees' time off, not for making them work on a specific day or at a specific time.

Contrary to the Seventh Circuit's conclusion, §§ 7(e)(6) and 7(e)(7) are not the appropriate sections to be concerned with here. Such a view reflects the court's misapprehension of both the earned work credit system and the purposes of those two sections. Sections 7(e)(6) and 7(e)(7), by their plain texts, were designed to prevent requiring 'overtime to be paid on overtime,' not as compensation for "unpleasant or inconvenient schedule[s]." App. A at 10a. Since earned work credits are not related at all to working time, it is inappropriate to lump them together with night-shift or Sunday rates.

Moreover, the Seventh Circuit would include in §§ 7(e)(6) and 7(e)(7), and exclude from § 7(e)(2), types of payments that do not fall under the first two sections, but *do* meet its own formulation of the requirements of § 7(e)(2)! Included in that list are "premium wages for working . . . in noisy plants" (*id.* at 8a), "because the work is unpleasant, . . . for smelly or risky tasks, . . . [and for] foul-tempered supervisors . . ." *Id.* at 9a. The Seventh Circuit states that these factors dictate that such payments should be "handled under the terms of § 7(e)(7)." *Id.* at 10a. However, under its own definition of "similar," extra wages for working under such conditions would come under the § 7(e)(2) exception; none of them "depend at all on when or how much work is performed."

It is self-evident that the Seventh Circuit misread the nature of the earned work credit system and declined to give due

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tunities that a two-day weekend provides (such as being able to go away from home for recreation).

deference to the proper emphasis and purpose of the penalty. Instead, the court hastily tossed the system into an ill-defined grab-bag of "premiums," some of which actually pass the new test the court has unilaterally promulgated for § 7(e)(2). This illogical outcome should not be allowed to stand.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the decision below.

Dated: New York, New York
September 13, 1995

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-3835

ROBERT B. REICH, Secretary of Labor,

Plaintiff-Appellee,

—v.—

INTERSTATE BRANDS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 91-2345—Harold A. Baker, *Judge.*

ARGUED MAY 8, 1995—DECIDED JUNE 15, 1995

Before POSNER, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Shoppers make their largest purchases of baked goods on Saturday and Monday. To supply fresh products, bakeries are open on Friday and Sunday. Bakery workers' traditional work week has been Monday, Wednesday, Thursday, Friday, and Sunday. In 1972 the bakery workers' union staged a nationwide strike to back up its demand for weekly schedules with two consecutive days off. The employers were unyielding, fearing that a change would impair the freshness of the products on the main shopping days and thus dampen consumer demand. The strike ended with a compromise: workers got higher wages, and employers retained their right to require work without consecutive days off—but employers have to pay a price for exercising the privilege. An employer who gives any worker a schedule that does not include two consecutive days off in a given week must pay $12 per worker per week into a fund. In November of each year the employer distributes these "earned work credits" (as the collective bargaining agreement calls them) to all workers still on the payroll, according to the number of weeks each went without two-day breaks.

Ever since 1972 the collective bargaining agreement has provided that these $12 credits are not compensation for work performed but are "penalties" designed to induce employers to provide consecutive days off. The agreements say that the payments are not part of the base wage on which overtime pay is calculated. For two decades the Secretary of Labor apparently accepted that understanding; federal audits came and went without any challenge to the implementation of the program. In 1991, however, the Secretary reversed course and filed this suit, contending that the $12 payments are part of the employees' "regular rate" for purposes of § 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1). The district court granted summary judgment for the Secretary and entered an injunction requiring Interstate Brands Corporation to treat the $12 payments as part of the employees' regular compensation. 849 F. Supp. 1261 (C.D. Ill. 1994). The Secretary did not seek an award of back pay; the relief is entirely prospective, which makes us wonder why anyone is excited. In the long run the parties can adjust the collective bargain-

ing agreement to provide a little lower hourly rate (or a lower rate of increase at the next reopening) so that both employees and employers are indifferent between the current system and treating the $12 payments as part of the "regular rate." This litigation therefore appears to be about formal rather than functional issues. Nonetheless, we plow ahead because adjustment may be delayed or the employees themselves may sue for back wages; substance may lurk behind the form.

Some figures may help clarify the discussion that follows. Suppose bakery workers work 48 weeks per year, receiving an hourly wage of $10, and always put in five days per week. Half the weeks they get consecutive days off, and the other half they work on Monday, Wednesday, Thursday, Friday, and Sunday. The employer sets aside $288 per employee. Let us assume that the employer experiences 20% turnover, so by year's end each of the remaining employees is entitled to $360 from the kitty (those who leave in mid-year get nothing). If the employees labor 40 hours a week and never work overtime, then everything is straightforward: the employer disburses $360 to each. Now let's add overtime. According to the bakery, every overtime hour during the year earns time-and-a-half ($15 per hour). The Secretary, by contrast, believes that the $360 paid at year's end is part of the "regular rate." Forty hours a week for 48 weeks is 1920 hours. The $360 must be allocated to these hours, at 18.75¢ per hour (360 ÷ 1920 = .1875). The "regular rate" then is $10.1875 per regular hour, and the bakery must pay $15.28125 per overtime hour. For a baker who put in 100 overtime hours a year and was paid $15 per overtime hour during the year, the bakery owes an extra $28.125, and the check at year's end should be for $388.13 rather than $360. A baker who clocked more than 100 overtime hours would get more, and one who worked no overtime would settle for the $360. An employee who worked the M-W-Th-F-Su schedule three-quarters of the time, and was entitled to $540 at year's end, would have a reconstructed "regular wage" of $10.28 and a reconstructed overtime rate of $15.42. This employee would be entitled to an extra $42 for 100 hours of overtime and should receive $582 in the closing

settlement. Other schedules would be handled in the same fashion.

Things would get even more complicated if the employer had to estimate during the year how many weeks each employee would be entitled to the $12 credit in order to predict the final "regular wage" and pay the full overtime wage in each paycheck. So far as the FLSA is concerned, however, employer and employee may agree to deferred payment of wages to the extent they exceed the minimum wage. *Calderon v. Witvoet*, 999 F.2d 1101, 1107-08 (7th Cir. 1993) (dictum); see generally *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L.Ed. 1296 (1945). Although the "general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends", 29 C.F.R. § 778.106, nothing in the FLSA prevents a collective bargaining agreement from providing a different rule. The Secretary believes that "[w]hen the correct amount of overtime compensation cannot be determined until some time after the regular pay period," a retroactive adjustment is proper. *Ibid.*; see also 29 C.F.R. §§ 778.209, 778.303. The Secretary has not challenged the deferral mechanism in the baking industry's collective bargaining agreements, and we therefore assume that bakeries are entitled to compute and pay retrospectively, as in these examples.

Section 7(e) defines the "regular rate" to include "all remuneration for employment paid to, or on behalf of, an employee". The $12 credit, whether or not designed as a "penalty," is "remuneration for employment" and counts unless it comes within one of § 7(e)'s many exemptions. Interstate Brands relies entirely on § 7(e)(2), which excludes

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment[.]

According to Interstate Brands, the $12 credit is a "payment[ ] to an employee which [is] not made as compensation for his hours of employment".

The Secretary offers two responses that do not persuade. First is that the $12 credit is "compensation for . . . hours of employment" because it goes to bakers who work six-day weeks. That simply misunderstands the arrangement. The payment is due whenever the work schedule fails to provide consecutive days off. Consider two weekly schedules: M-Tu-W-Th-F and M-W-Th-F-Su. Each has five days and 40 hours, but only the latter draws the $12 credit. (Interstate Brands adds that $12 goes into the pot whenever an employee receives a M-W-Th-F-Su *schedule*, even if changes provide consecutive days off.) This difference in compensation for schedules having the same number of days and hours per week is the foundation of the bakery's argument.

The Secretary's other argument is that "similar" means "rare" or at least "infrequent," which disqualifies a credit that applies to a majority of employee weeks. Our difficulty here is that vacation pay and reimbursement of expenses, the other principal subjects of § 7(e)(2), are not infrequent by any understanding. Many employees receive reimbursements for expenses. Most collective bargaining agreements provide for an ample program of holidays and personal vacations, the value of which swamps the payments for "earned work credits." Congress has not delegated to the Secretary of Labor the power to interpret § 7 of the FLSA; he appears today as a prosecutor, much as the Attorney General does when enforcing the antitrust laws. Although courts should extend respect to the Executive Branch of government as it tries to chart a sensible course of implementation, see *Atchison, Topeka & Santa Fe Ry. v. Peña*, 44 F.3d 437, 445-47 (7th Cir. 1994) (en banc) (concurring opinion), we are not obliged to "defer" in the strong sense. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S. Ct. 1384, 108 L.Ed.2d 585 (1990). Instead we give the Secretary's bulletins the respect their reasoning earns them. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L.Ed. 124 (1944); *Roland Electrical Co. v. Walling*, 326 U.S. 657, 676-77, 66 S. Ct. 413, 421-22, 90

L.Ed. 383 (1946); cf. *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993). None of the Secretary's interpretive bulletins justifies the equation of "similar" in § 7(e)(2) with "infrequent." His brief is equally silent, and the novelty of the position suggests that his predecessors may have had different, but equally unarticulated, understandings. Recall that many waves of compliance audits in the baking industry did not draw a protest until 1991. A regional administrator filed an affidavit saying that despite appearances the Department of Labor had not changed policy. The district court was incredulous. We need not inquire when the Secretary first adopted the view he expresses in this case, because a public prosecutor is entitled to forgo prosecution, in order to make use of resources elsewhere, without contracting the scope of the statute. An unexplained period of non-prosecution, followed by an equally unexplained decision to prosecute, deprives us of a persuasive interpretation, however, and our own examination of the statute does not accord with the Secretary's current reading of "similar."

Although we are unimpressed with the Secretary's understanding of § 7(e)(2), we are not exactly bowled over by the bakery's. Interstate Brands wants us to disregard "similar" and exclude from § 7(e) any payment "not made as compensation for . . . hours of employment", which the bakery understands to mean "not measured by the number of hours spent at work". Excising a word from a statute is sometimes appropriate—for Congress sometimes cobbles together laws in a fashion that slights linguistic precision—but a litigant who wants to redact a statute needs to show that the context requires this step. Cf. *Hubbard v. United States*, __ U.S. __, 115 S. Ct. 1754, 131 L.Ed.2d 779 (1995); *Rowland v. California Men's Colony*, __ U.S.__, 113 S. Ct. 716, 121 L.Ed.2d 656 (1993). If Interstate Brands is right, then employers can evade the overtime requirements with ease. Imagine this compensation system: $52 (paid at year's end) for every day on which work is scheduled, plus the minimum wage for every hour actually worked. If the minimum wage is $3.50, this system produces $80 ($10 per hour) for an ordinary 8-hour day. It also yields an overtime rate of $5.25 per hour, roughly *half* of the aver-

age hourly wage rather than one and a half times the average wage. Interstate Brands chose a lower flat payment ($12 per week rather than $52 per day), but if the former is exempt under § 7(e)(2), then the latter has a good claim to equal treatment. Yet if the latter is an implausible understanding of the FLSA, why is Interstate Brands' system exempt?

We cannot read § 7(e)(2) in isolation, as the bakery invites us to do. See *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001-02, 108 L.Ed.2d 132 (1990); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). It is one among many exemptions, and a glance at a few of the others shows that § 7(e)(2) cannot possibly exclude every payment that is not measured by the number of hours spent at work. Consider § 7(e)(3)(a), which excludes bonuses from the computation of the "regular rate," but only when

> both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly[.]

A $2,000 year-end bonus for all employees, like the year-end distribution of accumulated $12 credits, is independent of the number of hours worked. Yet under § 7(e)(3)(a) the bonus must be included in the "regular rate" unless it is entirely discretionary with the employer—which the disbursement of the $12 credits is not. See *Walling v. Stone*, 131 F.2d 461 (7th Cir. 1942); 29 C.F.R. §§ 778.210, 778.212(b). Interstate Brands would have us believe that *Minizza v. Stone Container Corp.*, 842 F.2d 1456 (3d Cir. 1988), understands § 7(e)(2) to exclude bonuses that do not qualify under § 7(e)(3)(a). Doubtless the subsections of § 7(e) are not mutually exclusive; that a payment cannot be excluded under one subsection does not imply that every other subsection is inapplicable. But we hesitate to read § 7(e)(2) as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the "regular rate," for then most of the remaining subsections become superfluous. *Minizza* does not treat them so.

Union and employer resolved a dispute with an agreement to make two lump-sum payments. The third circuit treated these payments as equivalent to sums received in litigation rather than as compensation for work; this conclusion does not imply that all lump-sum payments negotiated in the collective bargaining process are excluded from the "regular rate." That there was a strike in 1972 cannot detract from the fact that the baking industry's accommodation involves long-term, planned distributions of a kind dissimilar to the one-time distribution in *Minizza*. It may be, as Interstate Brands stresses, that modern bakers are not in need of the FLSA to protect them from intolerable hours of work and penurious wages, but the overtime provisions of the FLSA apply without regard to the level of the standard wage. The genesis of the FLSA lay in a desire to improve the welfare of unorganized, low-wage employees, see *Brooklyn Savings Bank*, 324 U.S. at 707 n.18, but as is true with so many statutes the scope of the FLSA far outruns its original justification. There is no collective-bargaining exemption from the FLSA.

The $12 credits may be paid in a lump sum, but the right to receive them is tied to work schedules that employees dislike. They are akin to premium wages for working weekends, or the night shift, or in noisy plants. Section 7(e)(7) deals directly with premium wages, excluding from the "regular rate"

> extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

Section 7(e)(6) contains a similar provision for weekend work. So if a baker's regular weekday rate were $10 and the

rate for Sunday work were $15, the Sunday premium would not be figured back into the "regular rate," and time-and-a-half pay for overtime during the week would remain at $15. But if the Sunday rate were $14, the extra pay would be included in the "regular rate," raising the overtime rate for both weekdays and Sundays. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 68 S. Ct. 1186, 92 L.Ed. 1502 (1948); *Longshoremen's Union v. National Terminals Corp.*, 50 F. Supp. 26 (E.D. Wis. 1943), affirmed, 139 F.2d 853 (7th Cir. 1944). It is awfully hard to see why things should differ if the employer chooses to pay a "Sunday bonus" in a lump sum. If the bonus is high enough to take the Sunday hourly wage over 150% of the weekday wage, then § 7(e)(7) keeps it out of the "regular rate"; but if it is not high enough, the manner of its payment cannot sensibly make a difference.

All of this suggests an understanding of the word "similar" in § 7(e)(2). The list preceding the phrase "other similar payments to an employee which are not made as compensation for his hours of employment" includes vacation pay, other compensation for hours not worked, and reimbursement of expenses. The word "similar" then refers to other payments that do not depend at all on when or how much work is performed. An extra payment made because the workplace is unpleasant, or the hours irregular, is no different in principle from a higher base rate compensating the employee for smelly or risky tasks, foul-tempered supervisors, or inability to take consecutive days off. By comparison, "call-back pay," or compensation for abbreviated rest between work periods, has some potential for exclusion under § 7(e)(2), as 29 C.F.R. § 778.222 provides. Call-back pay does not depend on the inconvenience of the ordinary schedule or even of the hours in the second slot; it is paid even if the second shift is 9-5 on a weekday (indeed, even if the second shift is a single hour). We need not decide whether § 778.222 is a proper reading of § 7(e)(2) to be confident that earned work credits in the bakery industry are analogous to premium rates for "bad" shifts. Whether paid contemporaneously in the hourly wage or deferred and treated like a bonus, compensation for working

an unpleasant or inconvenient schedule should be handled under the terms of § 7(e)(7).

The district courts injunction reads:

> The defendant, Interstate Brands Corporation, is permanently enjoined from treating "earned work credits" as "other similar payments" under 29 U.S.C. Section 207(e)(2) exempt from calculation as part of the "regular rate of pay" and the overtime rate of pay.

This is correct as far as it goes, but our analysis implies that the reference to § 7(e)(2) is an important limit. The district court did not compel Interstate Brands to include the $12 credits in the "regular rate." Although § 7(e)(2) does not apply, it is potentially necessary to use the framework of § 7(e)(7). Suppose a baker's regular weekday wage is $10 per hour and the stated wage for Sunday work is $14. The $12 "earned work credit" amounts to an extra $1.50 per hour for an eight-hour day on Sunday. Figuring this credit back into the Sunday rate would yield $15.50 per hour, a premium wage more than 150% of the regular weekday wage, and the $12 credit then would be shielded by § 7(e)(7). What is more, the extra 50¢ would be credited toward overtime compensation for weekday work under § 7(h). See *Alexander v. United States*, 32 F.3d 1571 (Fed. Cir. 1994). This is only an illustration; we have not attempted to apply § 7(e)(7) to the actual collective bargaining agreement, because Interstate Brands has not argued that the application of § 7(e)(7) would make a difference and therefore has forfeited any benefit of that subsection in this litigation. All we hold today is that § 7(e)(2) does not keep the $12 credits out of the "regular rate." How the earned work credits should be treated under § 7(e)(7) and (h) is a subject that may become important in any follow-on litigation seeking back pay, and the effect of these subsections is open for decision then.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No: 91-2345
Filed October 7, 1994

ROBERT REICH, Secretary of Labor,
United States Department of Labor,

—v.—

INTERSTATE BRANDS CORPORATION, a corporation,

AMENDED
JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff and against the defendant, plus costs of suit. The defendant, Interstate Brands Corporation, is permanently enjoined from treating "earned work credits" as "other similar payments" under 29 U.S.C. Section 207(e)(2) exempt from calculation as part of the "regular rate of pay" and the overtime rate of pay.

October 7, 1994

John M. Waters
Clerk

Mary C. Burmeister
By: Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 94-2200

September 6, 1994

ROBERT REICH, Secretary,
United States Department of Labor,

Plaintiff-Appellee,

—v.—

INTERSTATE BRANDS CORPORATION, a corporation,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois, Danville Division.

No. 91 C 2345

Harold A. Baker, Judge.

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

A review of the short record and of the jurisdictional memoranda submitted by the parties in response to this court's orders of May 26, 1994 and June 13, 1994 reveals that this suit was brought be the Department of Labor seeking a permanent injunction against defendant-appellant. The Rule 58 judgment entered in the present case merely recites in full that "judgment is entered in favor of the plaintiff and against the defendant, plus costs of suit." This is not a final appealable judgment within the meaning of 28 U.S.C. § 1291. See *American Inter-Fidelity Exchange* v. *American Re-Insurance Co.*, 17 F.3d 1018, 1020 (7th Cir. 1994) (The Rule 58 judgment "should *award* the relief to which the prevailing party is entitled, not simply announce an entitlement."). Although the parties in their respective jurisdictional memoranda states that each is aware of the terms of the injunction, an unenforceable "injunction" creates no case or controversy under Article III of the Constitution. *Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 275-76 (7th Cir. 1992). Accordingly, we dismiss this appeal for lack of jurisdiction. A new notice of appeal must be filed within the time limits specified in Fed. R. App. P. 4(a) when the district court enters a proper Rule 58 judgment that specifies the terms of the injunctive relief awarded in compliance with Fed. R. Civ. P. 65(d).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Case No. 91-2345

Filed March 21, 1994

ROBERT REICH, Secretary of Labor,
United States Department of Labor,

Plaintiff,

—vs.—

INTERSTATE BRANDS CORPORATION, a corporation,

Defendant.

ORDER

This suit was brought by the Department of Labor (DOL) seeking a permanent injunction to restrain Interstate Brands Corporation (IBC) from further violations of the Fair Labor Standards Act (FLSA). Both parties moved for summary judgment. The only issue in the case is whether "earned work credits" qualify as "other similar payments" under 29 U.S.C. § 207(e)(2), and, like the other payments described in that section, are exempt from calculation as part of the "regular rate" of pay, and therefore, the overtime rate of pay. In its

most recent order,[1] the court determined that the interpretation of the statute urged by the DOL was plausible, but because that interpretation differed dramatically from the interpretation that appeared to have been in place prior to this litigation, the DOL was ordered to provide a "reasoned analysis" for its change in interpretation, based on the requirement in *Rust v. Sullivan*, 500 U.S. 173, 186, 111 S.Ct. 1759, 1769, 114 L.Ed.2d 233 (1991). The DOL has put forward a sufficient analysis and the court now grants summary judgment in favor of the plaintiff, the DOL.

* * * * *

In directing the DOL to show a reasoned analysis for its change in interpretation of the statute, the court referred to three cases in which the Supreme Court had required just such an explanation. *Rust*, 500 U.S. 173, 111 S.Ct. 1759; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984); and *Motor Vehicle Association of United States v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L.Ed. 2d 443 (1983). The DOL accurately makes the point that each of these cases is a rulemaking case, where a new regulation has been promulgated, and the new regulation differs dramatically from the previous rule. However, the basis for requiring an agency to provide a reasoned analysis is a protection against arbitrariness on the part of the agency. As stated in the court's previous order, there are many valid reasons for allowing agencies the flexibility to change their policies. But no reason, or a bad faith reason for change would not be sufficient. Thus, an agency must provide a reasoned analysis to the public when it changes a policy as a protection to the public against arbitrary or bad faith acts on the part of the agency.

Admittedly, the cases in which this requirement has been applied have been cases where a new regulation has been promulgated. However, the court finds that the case of a new interpretation of an existing regulation, as happened with IBC and DOL, provides an equally compelling need for an expla-

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[1] See Order, Docket #23, September 15, 1993

nation for the agency's change of mind. In the case of promulgation of a new rule, notice is provided in the Federal Register. Public hearings are held, and private parties have ample opportunity not only to become aware of the proposed changes, but to participate in the process of developing the new regulations.

In contrast, when an agency suddenly adopts a dramatically different interpretation of an existing rule, the agency does not have to provide anyone with notice or an opportunity to be heard. Requiring a reasoned analysis for change of an established longstanding interpretation of a rule can only have a salutary effect for all those affected by the rule. Therefore, the court now holds that when an agency changes its interpretation of an established regulation, it must provide a reasoned analysis for the change.

The DOL argues that it has not changed its position regarding the earned work credits as "other similar payments" under 29 U.S.C. § 207(e)(2), and in fact submits an affidavit by the Administrator of the Wage and Hour Division, Employment Standards Administration of the United States Department of Labor, affirming that the position of the DOL has always been not to include earned work credits under the definition of "other similar payments." However, if this has always been the interpretation of the DOL, that interpretation has not been apparent to the rest of the baking industry.

According to the IBC, virtually all of the collective bargaining agreements in the baking industry since 1972, covering nearly 30,000 baking employees nationwide, have included provisions allowing for the exemption of earned work credits from the calculation of the regular rate, and thus the overtime rate, of compensation for workers in the industry. IBC also states that the DOL audited IBC and other bakeries numerous times over the past two decades, yet never challenged the earned work credit practice.

The court finds that the DOL's claims of consistent interpretation of 29 U.S.C. §207 (e) (2) over the years are incredible. Twenty years of oversight of the baking industry by the DOL was more than adequate time for the DOL to make clear its position on earned work credits. The DOL argues that the

onus was on the baking industry to seek a formal opinion from the DOL on the status of earned work credits in the calculation of pay. Surely the abandonment by the DOL of early litigation on the issue, followed by twenty years of audits, which without exception allowed the practice to continue, would be sufficient affirmation for any industry that their accounting practices were acceptable. Consequently, the court finds that the interpretation urged by the DOL that earned work credits must be included in the calculation of the regular rate of pay is indeed a change in interpretation by the DOL.

Now the court must consider the reasons given by the DOL for this change in interpretation, and determine whether those reasons are sufficient justification for the change in policy. The DOL argues further or in the alternative that if there has been a change, the purpose of the change has been to make the actions of the DOL "consistent with the purposes and language of the Act and the applicable provisions of the Bulletin." (Docket #27, Plaintiff's Memorandum in Support of Motion for Reconsideration at 11). The DOL argues that earned work credits are a regular and recurring form of remuneration for work performed, and therefore are not the type of payment intended for exclusion from the regular base rate of pay as suggested by the purposes of the statute.

The court concludes that the DOL has managed to cross the threshold of providing a justification for its change in policy and procedure. Saying "this interpretation is the most consistent with the statute" does not speak well for an agency which has had over two decades to enforce this regulation but admits to "a discretionary course of relative inaction." (Plaintiff's Memorandum at 11). Despite the traditional deference to an agency's interpretation of its own regulations, and the right of an agency to change its own regulations, the fact that an agency has declined to enforce a regulation for over twenty years and suddenly decides to enforce it puts a tremendous burden on industries attempting to act within agency guidelines.

Nonetheless, the court acknowledges that attempting to enforce an interpretation of a regulation which is consistent with the purposes of the statute is a valid reason for a change in interpretation on the agency's part. The court is further persuaded by the facts that the new interpretation urged by the DOL is not unreasonable and that the relief sought by the agency in this case is only prospective in nature.

Consequently, because the court finds that the DOL has provided a sufficient justification for its change in interpretation of 29 U.S.C. §207 (e) (2), the court now grants summary judgment in favor of the plaintiff, the Department of Labor.

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment (Docket #11) is GRANTED.

IT IS FURTHER ORDERED that the defendant's motion for summary judgment (Docket #20) is DENIED.

IT IS FURTHER ORDERED that the plaintiff's motion for reconsideration (Docket #26) is DENIED as moot. The clerk shall enter a final judgment in accordance with this order.

ENTER THIS 21st day of March, 1993 [sic]*.

Harold A. Baker

Harold A. Baker
United States District Judge

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* From the District Court's file stamp & docket entry, it is obvious that the year here is in error and should be 1994.

APPENDIX E

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Case No. 91-2345

Filed September 15, 1993

ROBERT REICH, Secretary of Labor,
United States Department of Labor
Plaintiff,

INTERSTATE BRANDS CORPORATION, a corporation
Defendant.

ORDER

This suit was originally brought by the Department of Labor ("DOL") seeking a permanent injunction to restrain Interstate Brands Corporation from further violations of the Fair Labor Standards Act.

This case is before the court today on cross-motions for summary judgment. At issue is the question of whether the provision of "earned work credits" by Interstate to any employee scheduled to work a workweek without two consecutive days off is in violation of the overtime provisions of Section 7 of the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.) (FLSA).

Interstate Brands Corporation is a Delaware Corporation with headquarters in Kansas City, Missouri. Interstate produces and sells bakery goods nationwide. Three of Interstates' plants are located within this court's jurisdiction.

Interstate pays any employee scheduled to work a workweek which does not contain two consecutive days off an "earned work credit." For each week that an employee is assigned such a schedule, an earned work credit worth $12 is awarded. The earned work credits accumulate during the course of the year, and a lump sum is awarded to each employee not later than November 15th for the amount of all of the earned work credits received during the twelve months preceding the last pay period prior to November 1 of that year.

The collective bargaining agreement for Interstate employees states that "the accrual or payment of Earned Work Credits will not be included in the computation of any other fringe benefit, including overtime." However, the DOL contends that earned work credits must be considered in the computation of overtime pay.

> The FLSA provides for the computation of overtime pay:
>
> [N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."
>
> 29 U.S.C. §207(a)

Thus, the determination of the "regular rate," and specifically, which payments to employees are considered relevant in calculating the regular rate, becomes crucial, as overtime will be calculated as one and one-half times that regular rate. Under section 29 U.S.C. §207(e) ("Section 7(e)"), the "regular rate" is "all remuneration for employment paid to, or on behalf of, the employee" exclusive of seven specific exceptions enumerated in Section 7(e).

The crux of the disagreement between Interstate and the Department of Labor is whether earned work credits qualify as one of the exceptions that do not have to be considered in the calculation of the regular rate, and thus, overtime. The exception at issue is 7(e)(2) which provides that the follow-

ing types of compensation do not have to be included when calculating the regular rate:

> Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for travelling expenses, or other expenses, incurred by an employee in furtherance of his employer's interests and properly reimbursable by the employer; *and other similar payments to an employee which are not made as compensation for his hours of employment.*

The plaintiff DOL argues that earned work credits are not "other similar payments." The DOL advocates a narrow reading of "other similar payments," and suggests that any payment to qualify in this catch-all category should be infrequent and sporadic, like the preceding two categories of pay. However, the DOL categorizes earned work credits as regular and recurring remuneration paid to individuals required to work undesirable work schedules. Consequently, the DOL argues that these payments must be prorated back over hours of the period to which they are allocable to determine the increase in the regular rate of pay, which will then aid in determining the required increase in overtime pay.

Defendant Interstate argues for a much broader interpretation of "other similar payments," which would include in its definition any money received by an employee from Interstate which is actually a *penalty* against the company. Interstate maintains that the system of earned income credits was instituted to discourage employers from scheduling union employees for workweeks without two consecutive days off, and then punishing them if they did so. Interstate argues that several factors point toward the conclusion that earned work credits are tied to scheduling by the employer, rather than hours worked by an employee: 1) earned work credits are not tied to the actual hours *worked by an employee* (because they are awarded for any week *scheduled* without two consecutive days off and they can be awarded regardless of the number of

hours an employee works); 2) earned work credits are not regular or automatic payments; and 3) any employee who terminates employment before distribution of earned work credits does not receive a payment for that year.

PROCEDURE

The parties disagree only as to the central question of whether earned income credits are an exception to the types of remuneration considered in calculating regular pay, and thus, overtime. The court finds, and the parties at the hearings on the motions for summary judgment conceded, that there are no genuine issues of material fact present in this case. Thus, the case is ripe for a summary judgment ruling. F.R.Civ.P. 56 (c).

ANALYSIS

The singular issue on summary judgment is one of statutory interpretation. Specifically, the question is whether earned income credits are "similar payments [made] to an employee which are not made as compensation for his hours of employment." 29 U.S.C. § 207(e). The statute is not clear as to whether earned income credits fall within this category.

If a statute is unclear on a particular issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc., v. Natural Resources Defense Council. Inc.*, 467 U.S. 837, 843 (1984). Thus this court must determine whether the agency's interpretation of the statue is "permissible." To be permissible, an interpretation of a statute need not be the only one a court could permissibly have adopted, or even the construction that the court would have chosen if the question had arisen initially in a judicial proceeding. *Id.* at 843, n.11. It need only be a reasonable construction of the statute.

In considering the interpretations urged by both parties in this case, substantial deference must be awarded to the interpretation urged by the Department of Labor, as the DOL is the

agency authorized to administer the FLSA. *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). If the Secretary of Labor's construction of the statute "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent," then it does not constitute an abuse of discretion on the Secretary's part. *Id.*

The court finds that the interpretation urged by Interstate is a plausible construction of the statute. Excluded from the computation of a regular rate of pay are those "other similar payments to an employee which are not made as compensation for his hours of employment." 29 U.S.C. § 201 (e)(2). In defining "other similar payments," the Secretary has described as one example call-back pay. Call-back pay consists of payments "made, on infrequent and sporadic occasions, solely because the employee has been called back to work before a specified number of hours between shifts or tours of duty . . . [made] over and above the employee's earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), [and] is considered as a payment that is not made for hours worked." 29 C.F.R. 778.222. Earned work credits paid to an employee assigned a work week without two consecutive days off are arguably similar to the "call-back" pay described in §778.222, in that both appear to be payments made to employees for inconvenient work schedules.

However, one glaring difference separates earned work credits from "other similar payments," including call-back pay. Earned work credits are far from "infrequent" or "sporadic" in the baking industry. During the stipulated representative period of November 1991 to November 1992, sixty-six percent of the employees accrued earned work credits in more than half of their workweeks. (Stipulation of Facts, Exhibit B). This court finds reasonable the Secretary's interpretation that only "infrequent" and "sporadic" payments are "other similar payments" to be excluded from the calculation of the regular rate of pay. Therefore, because of the recurring and regular nature of earned work credits, they may not be excluded from the regular rate of pay calculations.

Defendant Interstate further argues that the interpretation urged by the Secretary of Labor should not be given substantial deference as it is a dramatic departure from the interpretation permitted for the past two decades. Indeed, Interstate's treatment of earned work credits has gone untouched by the DOL for twenty years. However, the United States Supreme Court has held just the opposite of the defendant's contention of deference to this longstanding interpretation by the DOL, finding instead that "a revised interpretation deserves deference because [a]n initial agency interpretation is not instantly carved in stone, and the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Rust*, 111 S.Ct. at 1769, citing *Chevron*, 467 U.S. at 863-864. The Supreme Court has acknowledged that an agency is not required to make rules that last forever, and that in fact, a prudent policy is to grant agencies substantial latitude to adapt their policies to changes in society. *Rust*, 111 S.Ct. at 1769, citing *Motor Vehicle Manufacturer's Association v. State Farm Mutual*, 463 U.S. 29, 42 (1983) (citations omitted).

However, should an agency chose to dramatically change its interpretation of a-statute that it is charged with administering, it must provide to the affected parties a "reasoned analysis" for doing so. *Rust*, 111 S.Ct. at 1769, citing *Motor Vehicles*, 463 U.S. at 42. In this case, the DOL has permitted the entire baking industry to consider earned work credits as "other similar payments" excluded from the calculation of overtime payments under 29 U.S.C. § 207 (e)(2) for two decades. Suddenly, the DOL argues that these payments are not at all "similar" to the rest of the payments listed in that subsection of the statute, and thus do not qualify for the exclusion. While this court finds the revised agency interpretation of the statute permissible, the DOL must provide to Interstate, and to the tens of thousands of baking employees nationwide affected by this change, a "reasoned analysis" for its change in approach.

IT IS THEREFORE ORDERED that the plaintiff is given twenty-one (21) days to file with the court documentation of the Department of Labor's "reasoned analysis" for the recent change in the Secretary's interpretation of the statute.

IT IS FURTHER ORDERED that the defendant is given twenty-one (21) days subsequent the filing of such documentation by the plaintiffs to file a response, should they so desire.

ENTER THIS 15 day of September, 1993.

Harold A. Baker
Harold A. Baker
United States District Judge

APPENDIX F

FAIR LABOR STANDARDS ACT AS AMENDED
SECTIONS 2 AND 7(e)
29 U.S.C. §§ 202, 207(e)

Sec. 202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Sec. 207. Maximum hours

(e) *Definition of "regular rate" of employment*

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day of workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to

such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract agreement for like work performed during such workday or workweek.

APPENDIX G

STATEMENT OF THE AMERICAN BAKERS ASSOCIATION CONCERNING THE EARNED WORK CREDIT, DATED DECEMBER 15, 1978

(Originally Attached as Exhibit A to the Affirmation of Stuart H. Bompey, Submitted in Support of Interstate's Cross-Motion for Summary Judgment in the United States District Court for the Central District of Illinois, dated July 13, 1993, Clerk's Docket #20)

INTRODUCTION

The American Bakers Association (ABA), with the support of the Bakery, Confectionery, and Tobacco Workers International Union, AFL-CIO (B, C & T), requests that the Department of Labor give full consideration to the policy implications underlying the "earned work credit" provision negotiated by the bakery industry and the B, C, and T. In an effort to assist the Department in accommodating the broad policy issues with the technical language of the Fair Labor Standards Act, the ABA offers the following views.

I. *Employers and Unions Involved*

The American Bakers Association includes in its membership approximately 250 wholesale bakers nationwide. These companies produce eighty percent of the bread products sold in the United States. The four major wholesale bakers which operate plants throughout the nation are American Bakeries Company, Interstate Brands Corporation, Campbell-Taggert Inc. and ITT Continental Baking Company. There are also numerous regional bakeries, such as John J. Nissen Baking Co., Metz Baking Company, and Mrs. Baird's Bakeries. Further, the industry includes many local bakeries such as, New Process Baking Co. and Trausch Baking Co. The vast majority of all production employees employed in the wholesale baking industry are represented by various locals of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO.

II. *History*

Historically, members of the Bakery, Confectionery and Tobacco Workers Union in the baking industry worked on Sunday, Monday, Wednesday, Thursday and Friday, and had Tuesday and Saturday off. This work schedule was necessitated by consumer demands. The two biggest shopping days have been and still are Saturday and Monday. To ensure freshness of product for consumers, therefore, it has always been necessary for the baking industry to produce on Friday and Sunday. However, beginning in the early sixties, the members of the Bakery and Confectionery & Tobacco Workers Union began demanding a Monday through Friday work schedule. These demands caused significant labor unrest within the industry. In major negotiations in 1972 in Southern California, the Bakery and Confectionery Workers submitted a list of proposals to the Employers that included the following demands:

a. That all employees be regularly scheduled to work a guaranteed five (5) consecutive day, Monday through Friday work week with two (2) consecutive days off, Saturday and Sunday, in any one work week;

b. That any work performed on Saturday be paid at the rate of time and one half the regular rate and any work performed on Sunday be paid at the rate of double time the regular rate.

During the negotiations, the Industry resisted these two (2) demands concerning the employees' work week. The Industry's negotiators stated that Companies could not and would not accept those demands because of market conditions which required that fresh products be available in the stores at all times including Monday. They said that if product was not baked on Sundays it would not be considered fresh by the consumers, and consequently it would not be purchased by the consumers.

Despite the foregoing response of the Industry, the Union remained adamant on its work week demands. Accordingly,

the members voted to strike in an attempt to force the Industry, through economic pressure, to agree to the work week demands set forth above. This vote was taken at a Union meeting on November 10, 1972. A strike resulted. The massive stoppage involved approximately 12,000 workers and affected about 50% of the bread produced in the Western states, Schools, hospitals, and small businesses were seriously affected. After two weeks, the strike moved east, closing plants in New York and Massachusetts. Again, thousands of workers were affected and bread shortages occurred.

Finally, after 30 days, the parties reached a compromise agreement on the work week demands. That agreement provided, in pertinent part, as follows:

> Any employee who is assigned to a work schedule that does not provide for two (2) consecutive days off shall be credited with an *earned work credit* of Ten Dollars ($10.00) for every week worked under such non-consecutive day work schedule. . .
>
> (The earned work credit) shall be paid in the form of a lump sum on January 1st of each year, *or*, such pay, once accrued, *may be taken in the form of paid time off* if the employee requests such time off and the employer agrees. (Emphasis supplied.)

The parties agreed that this additional pay or paid time off for Sunday work was to be a deferred payment evolving from the Company's right to schedule work days and work weeks. It was also agreed that this deferred payment for being scheduled to work on Sunday as a part of a non-consecutive day work week would not be considered part of the employees' "regular rate" and, thus, would not be included by the Company in the computation of overtime.

Since 1972, over 220 wholesale bakeries throughout the United States, operated by local and national companies and employing approximately 30,000 participating employees, have entered into collective bargaining agreements containing "earned work credit" provisions patterned after the strike

settlement. The "earned work credit" is paid as a once-a-year payment. An employee who works a non-consecutive day work week and fulfills certain other eligibility requirements is entitled to the credit. Additionally, the employee receives the earned work credit (assuming he fulfills the eligibility requirements) if he is scheduled to work a non-consecutive day work week even though he does not work the non-consecutive day work week. It is enough that he was so scheduled. Thus, the earned work credit is *not* dependent upon the number of hours worked. Finally, and very significantly, the employee may accept paid time off in lieu of the yearly lump sum payment.

III. *Prior Governmental Considerations*

Pursuant to Rules and Regulations of the Pay Board issued in 1970, it was necessary to submit the "earned work credit" provision for approval by the Board before it could be paid for the preceding calendar year.

On October 31, 1973, ITT-Continental Baking Company, Borden Inc., S. B. Thomas, Inc., and American Bakeries Company on behalf of themselves and other employers similarly situated throughout the country and the Bakery and Confectionery Workers International Union of America, AFL-CIO, by its International President, requested approval of the annual payment of the earned work credit as a fringe benefit and not as part of base pay under the guidelines which had been established.

In answer to the request submitted on behalf of the Industry and the International Union, the Cost-of-Living Council on December 26, 1973 approved the payment as a fringe benefit as it was negotiated and indicated that it was not part of basic wages.

IV. *Application*

The "earned work credit" provision has now been in existence in the baking industry for some five years. Generally speaking, it has operated to the satisfaction of the Industry, the International Union, and the employees. It was only

recently that the Department of Labor inquired into its operation with reference to the requirements of the Fair Labor Standards Act. After a local investigation, the Department instituted a lawsuit against one member of the American Bakers Association, ITT Continental, for violation of the Fair Labor Standards Act. This action was commenced in July of 1978 against ITT Continental on a nationwide basis to require the inclusion of the "earned work credit" payment in the regular rate for purposes of overtime computations under the FLSA. The case is presently in its preliminary stages.

V. *Policy Considerations*

There are some basic labor policy considerations which underlie the existence of the "earned work credit" provision and which militate in favor of its continuation outside of the "regular rate". The major considerations involve the nature of the industry, the vitality of collective bargaining, absence of employee impact, and possible inflationary impact.

A. *Nature of the Industry*

The "earned work credit" is a unique compromise to meet employee demands while not disturbing the production needs of the industry. The wholesale baking industry, unlike most traditional American industries, has always worked a non-consecutive five-day work week. The normal work schedule for production employees, to repeat, is Sunday, Monday, off Tuesday, Wednesday, Thursday, Friday, off Saturday. This odd workweek is necessitated by the shopping demands of the public. Saturday and Monday have always been the two heaviest sales days for bread products. Further, freshness of the product has been the cornerstone of consumer demand and consumer product acceptance. This consumer attitude necessitates a product delivery schedule as close as possible to the actual bake. Thus the sales drivers workweek tracks the production employees workweek one day later. The drivers' normal workweek is Monday, Tuesday, off Wednesday, Thursday, Friday, Saturday, off Sunday. By interweaving these two work

schedules. consumer demand can be met on every important salesday, and freshness is not compromised.

A five day Monday through Friday production workweek was, in fact, tried in the early seventies in the New York, Omaha and the Sioux City markets. The effects on the wholesale bakeries involved were extremely unfavorable and the parties were forced to renegotiate the non-consecutive day workweek in order to survive in the market. The consumer demand for freshness has not changed to date and, in fact, it has increased with the emphasis placed on removing chemical additives from all food products.

In light of these demands, it is apparent that the present framework of the industry should not be disturbed. The "earned work credit" should be continued in its present form to permit the satisfaction of consumer demands.

B. *Collective Bargaining Aims*

The history of the "earned work credit" focuses proper attention on the mutuality of interests of the B, C & T and the Industry in continuing the present contractual arrangements. The parties bargained long and hard to achieve a solution to the consecutive five-day workweek problem. They were at loggerheads as the major strike in 1972 demonstrated. Yet in the spirit of compromise and good faith collective bargaining, a unique compromise was achieved. A payment formula was conceived to compensate those employees working weeks with non-consecutive days off. A lump sum payment was arranged in order that the amounts were of sufficient size to enable individuals to use the money for long-desired goals.

The compromise has worked well. It is a tribute to the inventiveness of management and labor, together seeking solutions of industry problems. It is the kind of solution that the Department of Labor has urged in other industries with their own unique problems. Yet now, for some unknown reason, the Department has brought litigation against the industry which can only serve to destroy this delicate compromise.

We recognize the aims and purposes of the Fair Labor Standards Act. Yet we also believe that the principle of free col-

lective bargaining is the cornerstone of the national labor policy and all of the labor statutes. In accommodating these distinct aims, the unique cases should be recognized and dealt with based on their particular facts. Blind application of general rules would, in this situation, impose added costs on industry and reduce to a nullity the compromise solution. The issue of the five consecutive workweek would, based on labor-management reality, be raised anew and cause labor unrest with no perceivable solution.

All interested parties are opposed to this result. The International Union supports the "earned work credit" and the present method of treating the credit. (See attached statement of President John DeConcini.) The Industry supports the "credit". The majority of employees support the present system. Collective bargaining considerations support the "credit."

C. *Absence of Employee Impact*

Collective bargaining contracts negotiated between the Industry and the Bakery, Confectionery and Tobacco Workers International Union provide for an average hourly rate of $6.25 per hour. Overtime is paid daily after 8 hours and weekly after 40 hours in some parts of the country; it is paid daily after 7 hours and weekly after 35 hours in other parts of the country. Thus, these labor agreements more than satisfy all of the requirements of the FLSA and are in keeping with the baking industry's historical commitment to do so. Baking industry wages are 40% higher than those paid nationally for similar skilled work.

In addition, bakery workers participate in their own International Pension Fund, which has assets of about $500 million and provides substantial pension benefits. Health benefits for bakery workers are also substantial. Other fringe benefits are available. Thus, the wage and fringe package received by workers in this industry far exceeds that provided to most American workers.

The policy considerations underlying the Fair Labor Standards Act are directed toward the underpaid or low-paid

workers. These considerations are not applicable here and consequently the Act should be accommodated to the overriding policy favoring free collective bargaining.

D. *Possible Inflationary Impact*

This Administration has made it quite clear through its voluntary wage and price controls program that inflationary settlements are not to be countenanced. Yet, if the Department of Labor through FLSA demands upsets the delicate balance achieved by the International Union and the baking industry in resolving the thorny five-day workweek issue, it seems apparent that this issue will again escalate labor unrest with serious strike potential. In fact, the Industry and the Union will be negotiating this spring the very same agreements that conceived the "earned work credit." If the compromise is upset, the negotiations will probably center on other solutions to the consecutive workweek issue with higher cost impact. At the very least, there is a cost impact upon the industry to include the "earned work credit" payments in the regular rate. Overtime payments would be increased in the neighborhood of $1,000,000 per year. But this is only the beginning. Once the uniqueness of the payment is lost, it is likely that the union demands for the five-day workweek will reappear. To meet those demands may require the industry to make further substantial payments, such as, double time on Sunday. We have not calculated the cost of such a demand, but estimate it could cost in the neighborhood of $60 million per year. This demand would, of course, not substitute for the normal wage demands, but would be in addition to those demands. In such event, it is far more likely that the wage and fringe settlement would be beyond the wage guidelines advanced by the Administration to slow the inflationary spiral. Further, the impact of any such settlement would severely and adversely impact the Administration's anti-inflation program. This consequence seems unnecessary where the union, the Industry, and the overwhelming number of employees are content with the present operation of the "earned work credit". Permitting

the continuation of this program seems to make the best economic sense for the Industry, the employees and the public.

VI. *Action Requested*

In view of the fact that the action of the Department in filing suit in connection with the foregoing brings into serious question the conflict between the National Labor Policy favoring collective bargaining and the Department of Labor's interpretation of the provisions of the FLSA, we strongly believe that the lawsuit should not be continued without proper consideration of the policies relating to collective bargaining and enforcement of the Act. In the event the Department requires any additional factual background, we are prepared to furnish such information.

American Bakers Association
by Donald H. Gerrish
Labor Relations Director

STATEMENT OF THE BAKERY CONFECTIONERY, AND TOBACCO WORKERS INTERNATIONAL UNION, AFL-CIO, CONCERNING THE EARNED WORK CREDIT

On behalf of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, I wish to inform the Department of Labor that the International Union, representing thousands of workers in the United States, considers that the "earned work credit" provision was negotiated in good faith by the Union and the baking industry to solve a problem that caused a lengthy strike. Further, the former Pay Board, at the request of both parties, approved the settlement as a non-chargeable adjustment under the Economic Stabilization Regulations in effect in 1972.

In light of these circumstances, we feel that the Department should permit the parties to retain the "earned work credit" provision in its present form. It was never our intent that the $10 payment would be considered part of our members' hourly pay. Rather, we regarded the payment as a unique method to achieve a strike settlement responsive to the demands of our membership.

We join the industry in requesting the Department of Labor to reconsider its position on this very important subject.

John DeConcini

John DeConcini
President
Bakery, Confectionery, and
Tobacco Workers International
Union, AFL-CIO

November __, 1978

APPENDIX H

JOINT LETTER OF THE BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO, AND PARTICIPATING BAKERY EMPLOYEES, TO JOHN T. DUNLOP, COST OF LIVING COUNCIL, DATED OCTOBER 31, 1973
(Originally Attached as part of Exhibit C to the Affirmation of Stuart H. Bompey, Submitted in Support of Interstate's Cross-Motion for Summary Judgment in the United States District Court for the Central District of Illinois, dated July 13, 1993, Clerk's Docket #20)

[LETTERHEAD OF THE BAKERY CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO]

Office of the
International President

October 31, 1973

Mr. John T. Dunlop, Director
Cost of Living Council
???? M Street, N.W.
Washington, D.C. 20508

Dear Mr. Dunlop:

Collective bargaining agreements covering employees in the Metropolitan New York-Northern New Jersey area at American Bakeries Company, Drake Bakeries, Division of Bordon Foods, Borden Inc., ITT Continental Baking Company and S.B. Thomas Baking Company who are represented by Local 50, Bakery and Confectionery Workers' International Union of America AFL-CIO, expired in 1972. In each of the agreements, the parties agreed to language which provided for a joint Employer-Union Committee to be established for the propose of studying the practicality of modifications in the workweek and related conditions of employment designed to provide employees with a five (5) consecutive day workweek or to establish to the satisfaction of both parties that such

modifications in the workweek would not be in the best interest of the parties. This language also provided for the right to strike or lockout after November 1, 1972 if no agreement was reached on this subject. The workweek study committee language was in addition to the economic settlement reached between the parties for a three-year agreement. The Memorandums of Agreement (copies of which are attached hereto as Exhibit A) provided for the Employer to implement 6.2% in wages and benefits in accordance with the Economic Stabilization Act of 1970 as amended, in each of the three years of the agreement with a maximum increase in wages and benefits of $.38 per hour the first year; $.40 per hour the second year and $.42 per hour the third year. In the event 6.2% did not allow the full amount to be implemented in each year the union had the right to petition the Cost of Living Council for the amount not implemented (See Exhibit B for notification report for 1973).

In January 1972, American Bakeries Company and ITT Continental Baking Company agreed with Teamsters Local 194 and Teamsters Local 550, who represent driver salesmen at the New York City/New Jersey locations, to change from a six day distribution workweek schedule to a five day distribution workweek schedule. The five day distribution workweek schedule was established on the basis of a consecutive day workweek, Tuesday through Saturday. Because of this, the participating Employers had to schedule production employees on a five consecutive day workweek, Monday through Friday in order to meet sales needs.

The unfavorable experience with the consecutive day workweek in New York and New Jersey since January 1972 was one of the major factors which led to the parties reaching a compromise settlement of the workweek issue. Prior to reaching agreement, the B&C Union struck ITT Continental Baking Company at twenty-one of its locations including New York City and New Jersey for a period of two to four weeks. The workweek agreement was reached and executed on March 6, 1973. (See Exhibit C for copies of work-week agreement) This Agreement allowed participating companies to schedule

non-consecutive day workweeks and employees so scheduled to work such non-consecutive day workweeks were to be credited a ten dollar ($10.00) payment, retroactive to January 1, 1973, subject to Cost of Living Council approval. To a large extent it was possible to schedule cake and some specialty bread type production on a five consecutive day workweek and thus avoid the $10 premium for these employees. However, on a split distribution workweek schedule for driver salesmen it is necessary that bread production employees be scheduled on a non-consecutive day workweek basis. In the case of American Bakeries Company and ITT Continental Baking Company operations in Metropolitan New York and New Jersey which are primarily bread producing facilities, the workweek agreement resulted in an operating expense of approximately $251,680 annually. In the case of Drake Bakeries, S.B. Thomas, and the cake division of ITT-CBC, which are cake and specialty bread type producing manufacturers, the Workweek Agreement resulted in no additional operating expense other than a minimal amount due to the retroactive feature in the Agreement.

Therefore, on an overall combined bargaining unit the cents per hour cost is substantially reduced from approximately 25 cents per hour for those actually receiving the $10 premium to 5.2 cents per hour for the overall unit.

Notwithstanding this operating expense to the bread operations, there was a considerable savings offset achieved as a result of the non-consecutive day workweek agreement. Prior to April 9, 1973, which was the effective date when the bread employees changed to a non-consecutive day workweek schedule, the companies were required to pay a penalty pay to each employee who did not receive twelve (12) hours rest between shifts, thirty-six hours (36) rest on one day off, sixty (60) hours rest on two days off and eighty four (84) hours rest on three days off, etc., which provision is outlined in the attached agreements. Payments under the Short Rest Intermission Penalty by the Company were unavoidable because of scheduling requirements at the beginning and end of the pro-

duction workweek. As of April 9, the companies were able to schedule employees on a non-consecutive day workweek and more closely schedule production to fulfill its needs without incurring the additional penalty pay provided in the Short Rest Intermission Pen y Pay clause. The operating cost prior to the change was in excess of $130,000 annually. The current expense on an annual basis is approximately $20,000 which means the non-consecutive day workweek has resulted in an annualized cost reduction of about $110,000.

Another major savings as a result of a change to a non-consecutive day work schedule occurred in the cost of distribution. During the period January 1, 1973 thru April 8, 1973, the bread companies were distributing their product on the basis of a Tuesday thru Saturday workweek. In order to properly service the market involved it was necessary to utilize additional sales personnel to handle numerous relays on Thursday, Friday and Saturday of each week. In addition to the labor costs involved in relay type operations, it was also necessary for the company to increase the delivery cost thru the use of additional vehicular equipment. Subsequent to April 9th, the ability to distribute on a non-consecutive day workweek reduced the above mentioned costs approximately $140,000 annually, *which includes a substantial reduction in the use of gasoline.*

The Agreements reached in the New York/New Jersey area are similar to agreements reached in many other parts of the country. There are many employees who are now, for the first time, enjoying a five (5) consecutive day workweek. Those employees who are not working a consecutive day workweek are expecting to receive the ten dollars ($10.00) payment.

The ten dollar ($10.00) payment has provided an incentive for employers to schedule, to the extent possible, employees on a consecutive day workweek. Even where bread production can not be accomplished on a consecutive day workweek, there are operations in conjunction with production such as sanitation, mechanical and shipping and receiving, where provisions have been made so as to provide a consecutive day workweek for some of these employees.

ITT Continental Baking Company has approximately 4,100 employees at twenty-three locations who are covered by a workweek agreement similar to the New York/New Jersey Agreement. Where possible, the company has been scheduling employees to a 5-consecutive day workweek. About 1,750 employees covered by the Workweek Agreement are currently enjoying a five-consecutive day workweek and about 2,350 employees are anticipating the ten dollar ($10.00 payment for each non-consecutive day workweek. The ITT Continental Baking Company figures are fairly representative of the industry in general.

Attached is Exhibit D supplied by the union where similar workweek agreements have been agreed to and is a breakdown of geographical locations, companies, local unions and approximate number of employees.

The workweek settlement of which we are jointly seeking approval, is unique in that the PB Forms and other regulatory procedures do not do justice to this situation. We also would like to see the decision reached in the New York/New Jersey area become a precedent for the other similar workweek agreements in other parts of the country. We seek your advice in this matter and we appreciate your personal interest in resolving this important situation.

Very truly yours,

Bakery and Confectionery
Workers International Union
of America, AFL-CIO

Daniel E. Conway
Daniel E. Conway
International President

Participating Employers

[ILLEGIBLE] O'Brien
ITT-Continental Baking Company

[ILLEGIBLE]
Borden Inc.

[ILLEGIBLE]
S.B. Thomas, Inc.

E.J. Trainor
American Bakeries Company

APPENDIX I

LETTER FROM DONALD M. IRWIN, ADMINISTRATOR OF THE OFFICE OF WAGE STABILIZATION (THE "PAY BOARD"), TO ROBERT F. FOX, PRESIDENT OF THE FOOD EMPLOYERS COUNCIL, DATED MAY 31, 1974
(Originally Attached as Exhibit D to the Affirmation of Stuart H. Bompey, Submitted in Support of Interstate's Cross-Motion for Summary Judgment in the United States District Court for the Central District of Illinois, dated July 13, 1993, Clerk's Docket # 20)

[LETTERHEAD OF THE OFFICE OF WAGE STABILIZATION]

Mr. Robert F. Fox, President
Food Employers Council
2599 South Flower Street
Los Angeles, California 90007

Dear Bob:

This letter is in response to your letters dated May 8, 1974, and May 14, 1974, pertaining to the "workweek premium pay problem" of the captive bakeries in Southern California.

After reviewing this correspondence, along with other documents submitted earlier by the Food Employers Council, I have decided that there is not sufficient reason to alter my earlier decision as stated in my letter of December 26, 1973, (copy attached) to Mr. Daniel E. Conway. This stated that the Cost of Living Council would not challenge (and hence approves) contracts that contained the "consecutive workweek clause." This letter, furthermore, was meant to apply to all such clauses and not just to those of the companies specifically mentioned in the letter.

As my earlier letter stated, the above decision was based on staff analysis, discussion with some members of the Tripartite Food Industry Wage & Salary Committee, and discussion with other representatives of the industry and unions concerned. My current decision, as stated above, also takes into account

the correspondence I have read and discussions I have had with the parties specifically involved in the captive bakeries in Southern California. Much of the reasoning behind the decision stemmed from the fact that implementation of the consecutive workweek, by itself, does not constitute a chargeable adjustment according to Pay Board Regulations since, by itself, it does not result in more pay for the same hours worked or the same pay for fewer hours worked. (See Definition of "Wages & Salaries" and the Computation Rules in the Pay Board Regulations—6 CFR 201, Section 201.2 and Sections 201.51 through 201.64, Subpart E, respectively.) Hence, the ten dollars represented a trade off arrived at through the collective bargaining process for a nonchargeable contract provision. This fact was very important in my decision not to challenge this provision.

Another factor that influenced this particular decision is my belief that all consecutive workweek clauses in the bakery industry should be accorded the same treatment under the Economic Stabilization Program.

Let me remind you, however, that my decision only pertained to the consecutive workweek clause. Contracts containing this clause were not necessarily approved in their entirety but the other economic provisions remained subject to the Food Wage Regulations and recommendations made by the Tripartite Food Industry Wage and Salary Committee. I, of course, will review any such recommendations, accompanied by minority-majority reports, made with respect to the other economic provision involved in the Southern California captive bakery cases.

If I can be of further service to you, please contact me.

Sincerely,

Donald M. Irwin
Donald M. Irwin
Administrator

Enclosure

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

CIVIL ACTION

File No. 91-2345

ROBERT REICH, Secretary of Labor,
United States Department of Labor,

Plaintiff,

—v.—

INTERSTATE BRANDS CORPORATION, a Corporation,

Defendant.

AFFIRMATION OF STUART H. BOMPEY

I, Stuart H. Bompey, an attorney duly admitted to practice in the United States District Court for the Central District of Illinois, do hereby affirm that:

1. I am a member of the firm of Orrick, Herrington & Sutcliffe, attorneys for Defendant Interstate Brands Corporation ("Interstate" or "Defendant") in the above entitled action.

2. Attached hereto as Defendant's Exhibit A is a true and correct copy of a letter from Gene McDonald, Secretary-Treasurer of the Bakery, Confectionery and Tobacco Workers International Union, to Dick Cook, Director, Labor Relations for Interstate, dated November 9, 1993.

Dated: New York, New York
December 7, 1993

Stuart H. Bompey
Stuart H. Bompey

[LETTERHEAD OF THE BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION]

GENE MCDONALD
Secretary-Treasurer

November 9, 1993

Dick Cook
Director, Labor Relations
Interstate Brands Corporation
12 East Armour Boulevard
Kansas City, Missouri 64111

Dear Dick:

I am in receipt of the decision on earned work credits between Interstate Brands and the Department of Labor.

I am surprised at this development in light of the fact that there is not a single employer, that I am aware of, that negotiated the EWC to be anything other than a penalty for not providing a work schedule that allowed for two consecutive days off.

This decision conflicts with the good faith bargaining intent of all parties. Furthermore, this decision is beginning to cause confrontation at the bargaining table with other employers as they attempt to address the potential future ramifications of this decision.

Please keep me informed of any change in status in this situation.

Sincerely,

Gene McDonald
Gene McDonald
Secretary-Treasurer

GMcD:nw
cc: Frank Hurt, International President
David Durkee, Executive Vice President
Thomas Mangone, International Vice President
Gary Mounkes, International Vice President